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SUPREME COURT, U.S.

NO. 77-6673

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

THE STATE OF TEXAS

v.

ZACKARY C. BROWN

Appeal from the County Court at Law Number Two
El Paso County, Texas

JURISDICTIONAL STATEMENT

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ZACKARY C. BROWN

Appeal from the County Court at Law Number Two
El Paso County, Texas

JURISDICTIONAL STATEMENT

This is a direct appeal from the judgment of the County Court at Law Number Two for El Paso County, Texas, finding Appellant guilty of the violation of failing to identify himself.

A. Reports

The Court below wrote no opinion.

B. Jurisdiction

1. Appellant was charged with violating Section 38.02 of the Texas Penal Code in that he allegedly refused to give a report of his name and residence address to a peace officer who had lawfully stopped him and requested the information. Appellant was fined the sum of $45.00.

2. The judgment of the County Court at Law Number Two was entered on February 1, 1978. A Notice of Appeal was filed with that Court on February 14, 1978.

3. This Court has jurisdiction by virtue of Section 1257(2), Title 28, United States Code, which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court ... [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The judgment of the County Court at Law in this case is a decree rendered "by the highest court of a State in which a decision could be had," because pursuant to Article 4.03 of the Texas Code of Criminal Procedure, no appeal may be had to the Texas Court of Criminal Appeals where the fine imposed did not exceed $100.00. Article 4.03 provides as follows:

> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars.

4. The Texas Court of Criminal Appeals has previously held that where one is fined less than $100.00 in a County Court at Law, there is no appeal to the Texas Court of Criminal Appeals. Coates v. State of Texas, 308 S.W.2d 869 (Tex. Ct. Crim. App. 1957). See also, Williams v. Florida, 399 U.S. 78 (1970).

5. In this appeal, Appellant questions the constitutionality of Section 38.02(a) of the Texas Penal Code, which provides as follows:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

C. Questions Presented

QUESTION I. Section 38.02 of the Texas Penal Code is vague and ambiguous on its face and therefore violates the First Amendment because it unreasonably infringes on the right of a form of expression--that is, silence--and it also violates the due process clause of the Fifth and Fourteenth Amendments because it is vague and overbroad on its face.

QUESTION II. Section 38.02 of the Texas Penal Code is an unwarranted invasion of the right of privacy and therefore violates the Fourth Amendment.

QUESTION III. Section 38.02 of the Texas Penal Code punishes silence and is therefore a violation of the right to remain silent granted by the self-incrimination clause of the Fifth Amendment.

D. Statement of the Case

Shortly after noon on December 9, 1977, El Paso Police Patrolman Venegas and his partner were driving on Magoffin Street in the City of El Paso. They were patrolling the area and saw Appellant, ZACKARY BROWN, walking down an alley. Another person was seen walking in the alley, but the officers could not state that Appellant and the other pedestrian had met or had talked to each other.

The officers drove into the alley, stopped Appellant, and asked him his name and what he was doing in the alley. Appellant refused to give his name. Appellant was arrested. The officer noted that Appellant is a black male in his mid-twenties and that he stopped Appellant because he had not seen him in the area before. The officer admitted that many blacks are found in that area of town. The officer stated that he suspected no crime and just wanted to stop and ask Appellant

his name. Appellant was patted down and was taken to the jail for booking. No contraband or weapons were discovered in any search.

On the way to jail Appellant did tell the officers his name, but he was still booked. The officer noted that the violation was already complete.

Appellant was charged with the Class C misdemeanor, Section 38.02 charge. Prior to trial, Appellant moved in writing to dismiss the charges because Section 38.02 is unconstitutional as violative of

> ... Fifth and Fourteenth Amendment due process clauses, because it is vague and overbroad, and can punish innocent acts, because it invades the Fourth Amendment right of privacy, because it is possible under the statute to punish one's First Amendment right of silence as a form of expression, and also the right under the Fifth Amendment to remain silent.

The motion to set aside the charges was denied by the County Court at Law just before trial. Appellant excepted to the Court's ruling and bases this appeal on that ruling.

E. Substantial Federal Question

Appellant urges this Court to note probable jurisdiction in this case because of the substantial federal questions raised here.

In Terminiello v. Chicago, 337 U.S. 1, 4 (1949), this Court stated as follows:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

See also, Cox v. State of Louisiana, 379 U.S. 536 (1965).

If this Court has stricken down "public order" statutes because they might be used to punish provocative verbal acts,

then it should follow that statutes which punish non-provocative silence must also be invalid. Norwell v. Cincinnati, 414 U.S. 14 (1973).

In cases involving First Amendment rights, this Court has traditionally looked much closer at any statute potentially infringing on such protected activities. Those laws possibly punishing First Amendment protected speech or expression must be "narrowly drawn to prevent the supposed evil." Cantwell v. Connecticut, 310 U.S. 296 (1940); Aston v. Kentucky, 384 U.S. 195 (1966); and Keyishian v. Board of Regents of U. of St. of N.Y., 385 U.S. 589 (1967).

Silence, like other non-verbal acts or expressions, is constitutionally protected. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Moreover, silence, even total silence, is a specifically protected activity by the self-incrimination clause of the Fifth Amendment to the United States Constitution. See also, Women Strike for Peace v. Hickel, 420 F.2d 597 (D.C. Cir. 1969).

The Fourth Amendment provides that our right "to be secure in [our] persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...." (Emphasis added). It is respectfully submitted to this Court that these Fourth Amendment benefits are not secure if one can be punished, as Appellant here was, for refusing to give his name or address when there was no probable cause to believe that he committed a crime and, indeed, there was no suspicion that he committed a crime.

The overly broad language of the statute provides a weapon to those who would abuse it to punish persons who bothered no one but chose to remain silent. It could also, conceivably, allow police to punish those who did not furnish identification satisfactory to the police.

To allow the use of Section 38.02 would be to condone something much greater than a subtle erosion of our constitutional rights.

The three questions raised here are substantial constitutional questions and require review by this Court by way of full hearing, briefs, and argument. Perhaps some members of this Court might find the arrest of Appellant a minor matter. But Section 38.02 allows the police to arrest and jail those persons who have committed no crime and no breach of peace, nor indeed has there been any obstruction of the machinery of justice. Unfortunately for many, once the arrest is made the damage is done, and perhaps many of the charges are dismissed inasmuch as there appears no point in prosecuting further. The fact that prosecution was continued here provides an opportunity for review of a statute which has not been reviewed before, even by a Texas appellate court.

Prayer

For all the foregoing reasons, Appellant urges this Court to note probable jurisdiction and to set this case down for full hearing, briefs, and arguments on the merits. The questions raised are simply too important to ignore.

Respectfully submitted,

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By: Raymond C. Caballero
RAYMOND C. CABALLERO
Attorney for Appellant

IN THE COUNTY COURT AT LAW NUMBER TWO

EL PASO COUNTY, TEXAS

THE STATE OF TEXAS, Plaintiff, vs. ZACKARY C. BROWN, Defendant,	)	NO. 90916

FIRST AMENDED NOTICE OF APPEAL

TO THE HONORABLE COUNTY COURT AT LAW NUMBER TWO:

ZACKARY C. BROWN, Defendant above, hereby gives notice to this Court of his intention to appeal the Judgment of Conviction entered on February 1st, 1978. A final Judgment having been rendered by the highest Court of this State in which a decision could be had, an Appeal to the Supreme Court of the United States is sought pursuant to Title 28, U.S.C.A. Section 1257 (2).

Respectfully submitted,

PEARSON & CABALLERO
Attorneys for Defendant
1610 State National Plaza
El Paso, Texas 79901

By: Ree
RAYMOND C. CABALLERO

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing notice of First Amended Notice of Appeal was delivered to the Office of the County Attorney, City-County Building, El Paso, Texas 79901, on this 14 day of February, 1978.

Ree
RAYMOND C. CABALLERO